No. 90-1408

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

FRED T. BROWN,
Petitioner,

vs.

THOMAS STEEL STRIP CORP., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did this Court's decision in *Patterson v. McLean Credit Union*, _____ U.S. _____: 109 S. Ct. 2363 bar suits for discriminatory discharge under 42 U.S.C. Section 1981 ("Section 1981")?

PARTIES

The plaintiff before the courts below was Fred T. Brown.

The defendants before the courts below were Thomas Steel Strip Corp., Sam DiCiccio, Bill Riddick and Joe Maslach.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL BASIS 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

ARGUMENT 5

APPENDIX:

Opinion of the United States Court of Appeals for the Sixth Circuit (December 12, 1990) A1

Judgment Entry of the United States District Court (June 13, 1990) A4

Memorandum of Decision of the United States District Court (November 24, 1989) A5

Order of the United States District Court (November 24, 1989) A12

TABLE OF AUTHORITIES

Cases

Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990) 5

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 6

Lytle v. Home Manufacturing, Inc., 110 S. Ct. 1331 (1990) 7

Patterson v. McLean Credit Union, _____ U.S. _____, 109 S. Ct. 2363 (1989) 1,4,5,6,7

Prather v. Dayton Power & Light Company, 918 F.2d 1255 (6th Cir. 1990) 5,6

Runyan v. McCreary, 427 U.S. 160 (1976) 6

United States v. R. J. Reynolds Tobacco Co., 416 F. Supp. 316, 320 (D.N.J. 1976) 5

Statute

Civil Rights Act of 1866, 42 U.S.C. Section 1981 3,4,5,6,7

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OPINIONS BELOW

The District Court issued its opinion dismissing this case based upon *Patterson* on November 24, 1989. The Sixth Circuit Court of Appeals issued its decision affirming the District Court on December 12, 1990. Both of the above noted decisions are included in the Appendix to this Petition.

JURISDICTIONAL BASIS

The United States Court of Appeals for the Sixth Circuit entered its decision in the case on December 12, 1990. The Petition for Certiorari is filed pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves the interpretation of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, which provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

Fred Brown ("Brown") filed this action in the United States District Court for the Northern District of Ohio. Among the allegations made by Brown against Thomas Steel Strip Corp., Sam DiCiccio, Bill Riddick and Joe Maslach was that Brown had been discriminatorily discharged from his job. Brown contended that his discharge had been racially motivated. Brown invoked the district court's jurisdiction pursuant to Section 1981.

A jury trial on Brown's complaint began on May 2, 1988. A verdict was returned by the jury on May 12, 1988. The jury found against Thomas Steel Strip Corp. on Brown's discriminatory discharge claim. The jury awarded Brown compensatory damages in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00). The district judge awarded Brown equitable relief of Seventy Four Thousand Eight Hundred Ninety and no/100 Dollars ($74,890.00) by order dated June 10, 1988.

On August 30, 1988 the district judge vacated the jury verdict and ordered a new trial. Before the new trial went forward this Court's decision in *Patterson v. McLean Credit Union*, _____ U.S. _____, 109 S. Ct. 2363 (1989) was handed down. Based on *Patterson* the district judge dismissed Brown's lawsuit on November 24, 1989. The district judge interpreted *Patterson* as barring suits for discriminatory discharge under Section 1981. The Sixth Circuit Court of Appeals affirmed the dismissal of Brown's suit. The appellate decision was filed on December 12, 1990.

ARGUMENT

Petitioner presents this case to the Court based upon subsections (a) and (c) of Rule 10, Rules of the Supreme Court of the United States. First there is a clear split among the circuits regarding the continued application of Section 1981 in discharge actions. The decision of the Sixth Circuit in this case was based on that Court's previous decision in *Prather v. Dayton Power & Light Company*, 918 F.2d 1255 (6th Cir. 1990). The appellate court recognized the split in authority when deciding *Prather*:

> "Other circuits which have decided this issue have not agreed on whether *Patterson* excludes discharge cases from causes of action created by section 1981." 928 F.2d at 1257.

Specifically the Court of Appeals for the Eighth Circuit has held that this Court's decision in *Patterson* does not exclude discharge cases from Section 1981. *See Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990).

The majority opinion of this Court in *Patterson* does not address the relationship between Section 1981 and discharge cases. Only a decision by this Court in a discharge case can resolve the confusion which has arisen since *Patterson*. Absent a definitive statement from the Court important employment discharge cases will turn on geography rather than their merits. Only this Court can assure uniformity regarding the application of Section 1981 to discharge cases. *See United States v. R. J. Reynolds Tobacco Co.*, 416 F. Supp. 316, 320 (D.N.J. 1976).

Second, the decision of the Sixth Circuit in this case (and the other circuits taking the same view) does not conform with the prior views of this Court regarding the applicability of Section 1981 to discharge cases. As noted before, the majority opinion in *Patterson* did not address the relationship between Section 1981 and discharge claims. *Patterson's* majority opinion did, however, decline to overrule this Court's prior decision in *Runyan v. McCreary*, 427 U.S. 160 (1976). The basis for this position was the doctrine of *stare decisis*. In discussing this doctrine of "fundamental importance" the *Patterson* majority stated:

> "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." 109 S. Ct. at 2370.

Stare decisis applies to this Court's prior decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) to the same extent that the doctrine applies to *Runyan*. In *Johnson* this Court unequivocally held that Section 1981 did embrace discharge claims. 421 U.S. at 459-460. The Sixth Circuit's decision here deviates from *Johnson*. Hence, the Sixth Circuit has failed to honor the principles of *stare decisis* enunciated in *Patterson*. The Sixth Circuit's holding that Section 1981 no longer applies to discharge cases is in conflict with the prior decisions of this Court. Judge Boggs' dissenting opinion in *Prather* properly applied *stare decisis*. Judge Boggs there asserted that *Patterson* did not remove discharge cases from the ken of Section 1981.

> "As *Patterson* leaves open the question whether a discriminatory discharge violates Section 1981, I would respect the principle of *stare decisis* and

continue to permit, under Section 1981, suits alleging discriminatory discharges." 918 F.2d at 1262-1263.

Finally, this Court has specifically recognized that *Patterson* did not resolve the issue of discharge claims under Section 1981. In *Lytle v. Home Manufacturing, Inc.*; _____ U.S. _____, 110 S. Ct. 1331 (1990) this Court refused the opportunity to state that *Patterson* held that discharge claims could not be maintained under Section 1981. 110 S. Ct. 1336 fn. 3. The relationship between *Patterson* and discharge claims under Section 1981 must be addressed in this case. Beyond the conflict among the circuit courts discussed above, this case presents an important issue which must be decided by this Court.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 12, 1990)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.]

No. 89-4085

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRED T. BROWN,
Plaintiff-Appellant,

v.

THOMAS STEEL STRIP CORP., SAM DICICCIO, BILL RIDDICK, AND JOE MASLACH,
Defendants-Appellees.

BEFORE: KRUPANSKY and BOGGS, *Circuit Judges*; and CONTIE, *Senior Circuit Judge.*

PER CURIAM. Plaintiff-appellant Fred T. Brown (Brown), has appealed from the district court's grant of a judgment dismissing his complaint against appellees, Thomas Steel Strip Corporation, et al. (Steel Corporation). Brown initiated this action against Steel

Corporation and several of its supervisory personnel charging that the defendants had intentionally discriminated against him because of his race in violation of 42 U.S.C. §1981 by subjecting him to a racially hostile work environment and by terminating his employment.

After a six-day trial, the case was submitted to the jury with regard to four defendants: Steel Corporation, and the three individually named defendants Samuel DiCiccio, Joseph Maslach, and William Riddick. The jury denied Brown's claims alleging a hostile work environment against all four defendants. In addition, the jury concluded that the three individual defendants had not been culpable in a discriminatory discharge of the plaintiff as he asserted in his complaint. However, the jury returned a verdict against Steel Corporation on Brown's claim of discriminatory discharge, awarding him $250,000 in damages. The trial court also granted Brown $77,890 [sic] in the form of equitable relief representing back pay and prejudgment interest.

Steel Corporation thereafter moved for judgment N.O.V. or, alternatively, for a new trial, under Fed.R.Civ.P. 50 and 59, arguing that the jury's verdict was unsupported by the evidence and was inconsistent. On August 30, 1988, the district court granted Steel Corporation's motion and vacated the jury verdict as to all four defendants, noting not only that an award of $250,000 was not supported by the evidence because he merely suffered from headaches, upset stomach, lack of appetite, and loss of sleep for a short period of time after his discharge, but also that the jury verdict was inconsistent in that the jury determined that none of the individual defendants were guilty of discriminatory discharge while the corporation, Steel Corporation, was held liable. The district court accordingly ordered a new trial.

Before a new trial commenced, the Supreme Court issued its decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989). The Supreme Court determined in *Patterson* that an employee's claims of racial harassment by the employer were not actionable under 42 U.S.C. §1981 "because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." 109 S.Ct. at 2369.

Relying on *Patterson*, Steel Corporation filed a motion to dismiss Brown's complaint as failing to state a cause of action upon which relief could be granted. The district court agreed. In an opinion dated November 24, 1989, the district court concluded that *Patterson* precluded Brown's claim of a racially hostile work environment under section 1981. In addition, the district court determined that *Patterson* precluded claims of wrongful discharge under section 1981 because they did not arise as a result of either the formation of a contract or the enforcement of a contract. Brown thereafter filed this timely appeal.

This court, in the recently published opinion encaptioned *Prather v. Dayton Power & Light Co.*, No. 89-3999 (6th. Cir. November 14, 1990), has held that *Patterson* precludes a cause of action for discriminatory discharge under 42 U.S.C. §1981. This court has further held that *Patterson* is applicable retroactively. *Id.* Slip op. at 6.

Accordingly, for the reasons stated in *Prather*, the judgment of the district court dismissing appellant's complaint is AFFIRMED.

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed June 13, 1990)

C85-1508Y

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

FRED T. BROWN,

v.

THOMAS STEEL STRIP CORP., *et al.*

Name of Judge: ALICE M. BATCHELDER

[x] **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

That as to the first claim for wrongful termination of employment based on race, the judgment be and hereby is entered in favor of the plaintiff, Fred T. Brown and against the defendant, Thomas Steel Strip Corp., for compensatory damages in the amount of $250,000.00; for back pay and prejudgment interest in the amount of $74,890.00; and that judgment be and hereby is entered in favor of the individual defendants, William Riddick, III, Joseph Maslach, Jr., and Samuel DiCiccio.

IT IS FURTHER ORDERED and adjudged that as to the second claim, for on-the-job intentional racial harrassment, that judgment be and hereby is entered in favor of all defendants and against the plaintiff.

MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT

(Filed November 24, 1989)

Case No. C85-1508Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRED T. BROWN,
Plaintiff,

v.

THOMAS STEEL STRIP CORP., *et al.*,
Defendants.

JUDGE ALICE M. BATCHELDER

MEMORANDUM OF DECISION

Presently before the Court is the motion of the defendants for judgment on the pleadings. On review of the motion, the plaintiff's opposition to the motion, and the defendants' reply[1] thereto, the Court concludes that the motion for judgment on the pleadings is well-taken and must be granted.

The defendants, on June 22, 1989, filed their motion for judgment on the pleadings, arguing that following the decision of the United States Supreme Court on June 15, 1989, in *Patterson v. McLean Credit Union*, 109 S.Ct.

[1] Leave of Court is hereby GRANTED for the defendants to file their reply memorandum.

2363, the plaintiff's complaint in this case fails to state a claim under Title 42, United States Code, Section 1981, upon which relief can be granted. The plaintiff, in his opposition to the motion, concedes that his claim arising out of alleged racial harassment in the workplace must be dismissed in light of *Patterson*. However, he maintains that *Patterson* does not foreclose claims for wrongful discharge under §1981, and further, that even if this Court should decide otherwise, the *Patterson* decision should be applied prospectively only, and Mr. Brown's wrongful discharge claim in this case should be submitted to a jury.

With regard to the question whether a wrongful discharge claim under §1981 survives in light of the *Patterson* decision, the Court concludes that the language of that case clearly precludes claims for racially motivated discharge such as the one asserted by Mr. Brown. Discussing the scope of §1981 and the types of claims which properly may be brought under that statute, the Supreme Court stated:

> "... The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, *including breach of the terms of the contract* or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII."

109 S.Ct. at 2372-73 (emphasis supplied). To rely on the fact that the holding of *Patterson* was addressed to claims of racial harassment in the work place, the claim before the Court in that case, as a basis for concluding that wrongful discharge claims are not precluded by that decision, would be to ignore the clear direction of the Supreme Court to the contrary.

The plaintiff further argues that as an employee at will, the plaintiff entered into a new contract of employment with defendant Thomas Steel Strip Corporation each day, and therefore that the defendant, in discharging Mr. Brown, "refused to renew or reform the daily contract of employment," *see* Plaintiff's Memorandum in Opposition, at 5. This argument is without merit. This Court concludes that the claim under §1981 for wrongful discharge, as pled in the plaintiff's complaint,[1] is foreclosed by the Supreme Court's decision in *Patterson*.

The Court further concludes that *Patterson* decision be applied retroactively to the case at bar. Although a lengthy discussion of the procedural history of this case is not warranted, the Court notes briefly several procedural aspects of Mr. Brown's case relevant to the analysis of whether *Patterson* should be applied retroactively to this case. The plaintiff's complaint asserts claims against the defendant corporation and against several individual employees of the corporation

[1] For the purpose of determining whether the plaintiff's complaint states a claim upon which relief can be granted under §1981, the Court reviews only the complaint and answer, and the motion for judgment on the pleadings, the plaintiff's memorandum in opposition to the motion, the defendants' reply brief, and the applicable law.

based on §1981.[3] The plaintiff chose not to assert in his complaint a claim for racially motivated discharge under Title VII of the Civil Rights Act of 1964, the statute which provides an elaborate remedial framework for precisely that type of claim. The case was tried to a jury on the §1981 claims, and on May 12, 1988, the jury returned a verdict in favor of all defendants on the plaintiff's racial harassment claim, and in favor of the plaintiff and against defendant Thomas Steel Strip Corporation alone on the plaintiff's claim for wrongful discharge. Based in part on the inconsistent verdict of the jury, namely, that the individual defendants who provided the input for and actually made the decision to discharge the plaintiff had *not* intentionally discriminated against him, but that the corporation had intentionally discriminated against Brown in discharging him, the Court granted a new trial on the wrongful discharge claim (as well as the racial harassment claim) on August 30, 1988.

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971), sets forth the analysis to be used in determining whether a decision will be denied retroactive application. Three separate factors are to be considered in this analysis:

> 1. For a decision to be denied retroactive application, it "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106;

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[3] The plaintiff also had asserted in his complaint a pendent claim for intentional infliction of emotional distress. At the original trial of this matter, the Court directed a verdict in favor of all defendants and against the plaintiff on this claim.

2. If the decision establishes a new principle of law, the court must examine the purpose and effect of the rule in question, and its prior history, and whether retroactive application of the principle will further or retard its operation.

3. Finally, the Court must then weigh the inequity which would be imposed by retroactive application of the rule, and may refuse to apply the rule retroactively in order to avoid injustice or hardship.

Id. at 106-107.

Assuming for the purpose of this motion that *Patterson* establishes a new principle of law with respect to §1981 claims for wrongful discharge,[4] the Court will go on to consider the prior history of the rule and its purpose and effect and whether the retrospective operation of the rule will further or retard its purpose. As noted above, the Supreme Court, in construing the statute, noted that "[b]y its plain terms, the relevant provision in §1981 protects ... 'the same right ... to make ... contracts'," and went on to state that the right, as protected by the statute, "*does not extend, as a matter either of logic or semantics,* to conduct by the employer after the contract relation has been established, including breach of the terms of the contract ..." *Patterson*, 109 S.Ct. at 2372-73 (emphasis supplied). It cannot be maintained that retrospective operation of this decision which concludes that this statute, by its plain terms, protects the right to be free from racial discrimination at the time of the formation of the

[4] *But see Morgan v. Kansas City Area Transportation Authority*, No. 86-1352-CV-W-8, at 6 (W.D. MO., August 30, 1989) (available on Lexis) (granting defendant's motion for judgment notwithstanding the verdict on plaintiff's §1981 claim, stating that *Patterson* does not establish a new rule of law, but merely clarifies the application of §1981).

contract, but does not extend as a matter of logic or semantics to the type of conduct complained of in this case, will retard the purpose of the rule.[3] To hold otherwise would be to require a trial to be conducted on the question of whether the conduct, as to which the statute by its plain terms does not extend, is *prohibited* by that statute. The illogic of such an approach is manifest.

With regard to the third *Chevron* factor, the inequity which would result from retrospective operation of the new rule of law, the Court cannot conclude that this factor requires prospective application of *Patterson* in order to permit the plaintiff to have a new trial on his claims asserted under §1981. "Hard cases make bad law," as the old adage goes, and this case is no exception. To hold that a plaintiff has a cause of action under a statute where the statute cannot be construed to proscribe the conduct of which the plaintiff complains would be to work a substantial inequity on the defendants whose alleged conduct, while it might have been shown to violate Title VII, cannot be said to have violated this statute. Although it is unfortunate for the plaintiff that his claims have been found not to exist under the statute pursuant to which he chose to assert them, it is important to remember that the activity he complains of could have been, but was not, made the basis of a claim under Title VII.

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[3] Further, denying *Patterson* retroactive application to this case will not serve to encourage employers to discriminate unlawfully on the basis of race in making decisions to terminate employment, as this conduct clearly is and has been proscribed by Title VII.

For the foregoing reasons, the Court concludes that the *Patterson* decision must be applied retroactively to this case. Accordingly, the defendants' motion for judgment on the pleadings is GRANTED, and this case is DISMISSED.

IT IS SO ORDERED.

Dated this 24th day of November, 1989.

/s/ ALICE M. BATCHELDER
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 24, 1989)

Case No. C85-1508Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRED T. BROWN,
Plaintiff,

v.

THOMAS STEEL STRIP CORP., *et al.*,
Defendants.

JUDGE ALICE M. BATCHELDER

ORDER

This matter having come before the Court on the motion of the defendants for judgment on the pleadings and the plaintiff's opposition thereto, and the Court having issued a Memorandum of Decision as to the motion, the Court orders that for the reasons set forth in the Memorandum, the defendants' motion is GRANTED; judgment on the pleadings is rendered in favor of the defendants and against the plaintiff; and this case is DISMISSED.

IT IS SO ORDERED.

Dated this 24 day of November, 1989.

/s/ ALICE M. BATCHELDER
United States District Judge

(2)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES AND 29.1 STATEMENT

The plaintiff before the courts below was Fred T. Brown.

The defendants before the courts below were Thomas Steel Strip Corporation, Sam DiCiccio, Bill Riddick and Joe Maslach. Thomas Steel Strip Corporation's parent companies are Hille and Mueller, AG and BV Handelmaatshatij Voor Betonstaalmatten.

TABLE OF CONTENTS

PARTIES AND 29.1 STATEMENT i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

ARGUMENT 1

TABLE OF AUTHORITIES

Cases

Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990), *vacated and remanded*, 59 U.S.L.W. 3635 (March 18, 1991) (No. 90-324) 2

Lytle v. Household Manufacturing, Inc., _____ U.S. _____, 110 S. Ct. 1331 (1990) 4

McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3635 (March 18, 1991) (No. 90-756) 5

Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363 (1989) 2,3,4,5

Prather v. Dayton Power & Light Company, 918 F.2d 1255 (6th Cir. 1990) 2

Runyon v. McCrary, 427 U.S. 160 (1976) 3

Taggart v. Jefferson County Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990) (per curiam); *reh'g granted en banc*, December 11, 1990, *argued*, February 1, 1991 2

Statute

Civil Rights Act of 1866, 42 U.S.C. Section 1981 2,3,4

No. 90-1408

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

Petitioner has presented this case to the Court based upon subsections 1(a) and 1(c) of Rule 10, Rules of the Supreme Court of the United States. Contrary to Petitioner's contentions, neither of these provisions provides a basis for acceptance of this case by this Court.

Petitioner initially maintains that certiorari review should be granted because a split in authority exists between decisions of the Sixth and Eighth Circuit Courts of Appeals. *Compare Prather v. Dayton Power & Light Company*, 918 F.2d 1255 (6th Cir. 1990) *with Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990). The split in authority that Petitioner describes no longer exists. Subsequent to the filing of Petitioner's Petition for Writ of Certiorari, this Court has vacated and remanded the decision of the Eighth Circuit in *Hicks. Brown Group, Inc. v. Hicks*, 59 U.S.L.W. 3635 (March 18, 1991). The other decision of the Eighth Circuit concerning discharge cases under Section 1981, *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990), *reh'g granted en banc*, December 11, 1990, is currently awaiting decision following oral argument conducted on February 1, 1991. As a result, no valid decision of any United States Court of Appeals holds contrary to the decision by the Sixth Circuit in *Prather* concerning the exclusion of termination cases from Section 1981. Consequently, the cases no longer reflect any split of authority on this issue and Petitioner's argument concerning such a split provides no valid justification for this Court's grant of review of the decision below.

Petitioner's second argument to justify review in this Court is equally erroneous. Petitioner claims that the Sixth Circuit's decision in this case does not conform with the prior views of this Court regarding the applicability of Section 1981 to discharge cases. In making such an assertion, Petitioner misconstrues the impact of *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989).

The decision in *Patterson* reaffirmed the general rule of *Runyon v. McCrary*, 427 U.S. 160 (1976), that §1981 prohibits racial discrimination in the "making" and "enforcing" of private contracts. *Patterson*, however, also clarified which aspects of the employment relationship are encompassed within the right granted by §1981 to "make" and "enforce" contracts. This Court concluded that the right to "make" contracts concerned itself only with the formation of the contract, not with problems that later arise:

> The first of these protections [to make contracts] extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts *does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract* or imposition of discriminatory working conditions.

Patterson, 109 S. Ct. at 2373 (citation omitted).

Similarly, this Court views the right to "enforce" contracts as relating only to the ability to enforce the contract through legal process:

> The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights. As Justice White put it with much force in *Runyon*, one cannot seriously "contend that the grant of the other rights enumerated in §1981 [that is, other than the right to "make" contracts,] *i.e.*, the rights 'to sue, be parties, give evidence,' and '*enforce*

> contracts' accomplishes anything other than the removal of *legal* disabilities to sue, be a party, testify or enforce a contract. Indeed, it is impossible to give such language any other meaning."

Patterson, 109 S. Ct. at 2373 (citation omitted).

Applying these principles to the action that was brought by Petitioner, it is manifest that none of his allegations relate to the making and enforcing of contracts as defined by this Court. Contrary to Petitioner's assertions, the continued use of Section 1981 in cases involving terminations has been foreclosed by this Court in *Patterson*.[1]

Petitioner argues that the facts of the *Patterson* case did not include an allegation of wrongful termination and the case did not, therefore, upset prior case authority in that regard. Petitioner is, of course, correct in the technical sense that the facts of the *Patterson* case did not present the issue of racially-motivated termination. There is no doubt, however, that the majority opinion of this Court spoke expressly to the issue:

> . . . [T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract . . .

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[1] *Lytle v. Household Manufacturing, Inc.*, _____ U.S. _____, 110 S. Ct. 1331, 1336 n.3 (1990), cited by Petitioner does not support the contrary proposition. The footnote in *Lytle* addresses the ability of the parties to argue the proper interpretation of *Patterson* when that issue was not properly presented to the Court. The Court concluded that the application of *Patterson* to the facts of that case should not be made without a full development of the record and a lower court determination.

Patterson, 109 S. Ct. at 2373. Further, at footnote 6 of the *Patterson* decision, this Court was careful to explain that it did not expect lower courts to expand the usual meanings of "make" and "enforce" to cover wrongs alleged by plaintiffs:

> In his separate opinion, Justice Stevens construes the phrases "the same right ... to make ... contracts" with ingenuity to cover various postformation conduct by the employer. But our task here is not to construe §1981 to punish all acts of discrimination in contracting in a like fashion, but rather merely to give a fair reading to [the] scope of the statutory terms used by Congress. We adhere today to our decision in *Runyon* that §1981 reaches private conduct, but do not believe that holding compels us to read the statutory terms "make" and "enforce" beyond their plain and common sense meaning. We believe that the lower courts will have little difficulty applying the straight-forward principles that we announce today.

Patterson, 109 S. Ct. at 2377 n.6. These plain statements of the Court demonstrate that no important issue remains to be resolved. *Cf. McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3635 (March 18, 1991). For this reason and because no split in authority remains between the Circuit Courts of Appeal, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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